

ROLE OF THE PUBLIC PROSECUTION SERVICE OUTSIDE THE FIELD OF CRIMINAL JUSTICE

QUESTIONNAIRE

To part I of clause 3 - amendment

“If the criterion of efficiency of non-criminal competence can be the proportion of motions (legal actions) of the public prosecutor's office allowed by the court from the total number of submitted motions, then the Supreme public prosecutor's office has exact data at disposal concerning its own motions. The success rate of administrative actions as well as actions due to paternity denial, for which the law legitimises the Supreme public prosecutor, is almost hundred per cent. It itself signals the social need of this tool for law enforcement. Also motions (legal actions) of regional public prosecutor's offices for cancelation of trading companies pursuant to section 68 (6) of Commercial Code are also very successful. At some regional public prosecutor's offices (mainly at Municipal public prosecutor's office in Prague), the number of these legal actions is quite high. The courts only rejected them in exceptional cases. These legal actions are highly important for elimination of possible tools of economic criminality. Legal reasons for filing such an action are often established by the public prosecutor's office in the course of the criminal proceedings but also within the proceedings in the matter of the commercial register which the public prosecutor's office is authorised to enter. One of the most frequently specified reasons for the legal action is company inactivity lasting for several years or even since its establishment. These companies can be misused for illegal activities and they can also be a tool for “money laundering” etc. The efficiency and importance of non-criminal competence are also clear from the requirements of the civil society for extending of this competence to the areas where rights of those natural persons whose rights are most threatened due to their personal qualities or psychical condition can be affected or where rights of natural persons can be threatened to such an extent that their own individual defence is difficult and in its results it can only lead to a partial correction. Thus there are stronger and stronger requirements for the public prosecutor's office to enter all the proceedings at the court in the matter of determination of admissibility of acceptance or keeping in a health care institution, capability of legal acts and other matters determined by law from the area of social and legal protection of children. These are areas where fundamental human rights and freedoms could be affected. Limitation of non-criminal competence in the past in these areas was seen by people and also a significant part of professional public as an ill-considered and wrong step based on ideological motives rather than on rational analysis of efficiency of legal guarantees. However, practice forced a repeated, gradual extension of non-criminal competence of public prosecutor's office.”

To part II

To clause 5: Efficient enforcing of non-criminal competence would be unthinkable without specialisation of public prosecutors. This specialisation is gradually reflected in creation of internal divisions of the individual Public prosecutor's office where the public prosecutors assigned with settlement of non-criminal agenda are placed.

At the Supreme public prosecutor's office there is a non-criminal division. At High public prosecutor's office (in Prague and Olomouc) they only created a non-criminal department. In near future they will also create specialised non-criminal divisions. Non-criminal departments are at regional public prosecutor's office. At district public prosecutor's office there are no specialised non-criminal departments. Here the non-criminal competence is performed by one of the public prosecutors, often not exclusively, but alongside the criminal agenda.

To clause 6:

Ad a) As it was said in part I, in the non-criminal area the public prosecutor's office does not have a right to make decisions which establish, change, cancel or bindingly determine rights and obligations (duties) of natural persons or legal entities. A certain exception is sometimes seen in the means entrusted by the authorised public prosecutors during the performance of supervision of observance of legal regulations during performance of detention, imprisonment sentence, institutional or protective education.

The nature of measures entrusted to public prosecutor's office thus corresponds to its position of guardian of public interest, as well as nature of non-criminal competence defined by law. Non-criminal competence is fulfilled by presence of the public prosecutor's office in civil proceedings and performance of supervision over detention in the sections defined by law. Thus in the cases specified by law the public prosecutor's office can lodge a motion (legal action) for commencement of civil proceedings or to enter the civil proceedings in the matters enumerated in the Civil procedure Code. In cases when the civil proceedings were commenced by its motion, it is a party of these proceedings as the complainant (plaintiff) and thus it is entitled to procedural authorisations (rights) and obligations of a party of proceedings. The public prosecutor's office that entered civil proceedings is not a party of the proceedings but its special subject.

The public prosecutor's office that entered the proceedings is authorised to perform all actions in such proceedings as can be performed by a party of the proceedings, unless they are proceedings that can only be performed by a party of the legal relation, i.e. proceedings that belong to the party as a party of the material law relation. The public prosecutor's office that entered the proceedings is thus entitled mainly to submit proposals for performance of necessary evidence, submit statements concerning the matter to the court and submit ordinary remedies. From extraordinary remedies it is only entitled to file a legal action due to confusion (nullity plea) in the specified matters. It cannot file an extraordinary appeal or proposal for permission of reopening of proceedings, as its procedural rights and obligations in the proceedings it entered only last until the decision, by which the proceedings are concluded, comes to legal force. To enable the public prosecutor's office entering the proceedings to submit also other extraordinary remedies (i.e. with the exception of the legal action for confusion - nullity plea), it would have to be legitimised for it explicitly by law. As regards the participation of the public prosecutor's office in the civil proceedings on the basis of its motion (legal action), then as a party of these proceedings it is entitled to submit also extraordinary remedies, when the legal conditions are met.

Thus we can conclude that public prosecutor's office participating in civil proceedings does not have more rights than those belonging to parties of the proceedings.

The Act on the Public prosecutor's office entrusts to the public prosecutor's office the means ensuring its activities. They are used for investigation of conditions for application of its rights (authority), i.e. for establishment of conditions for submitting of proposal for opening of proceedings and entering civil proceedings. These means include lending of a file by bodies and persons specified by law, provision of explanations, imposition of disciplinary penalties, acceptance and handling of submissions. The relevant acts determine special means for performance of supervision over observance of legal regulations during imprisonment sentence, detention and institutional and protective education. During the performance of the specified supervision, the authorised public prosecutor is entitled to:

- enter places where the detention is performed anytime,
- examine the obligatory documentation filed in the facility performing the institutional or protective education and the documents filed in prisons according to which the convicts were imprisoned or according to which the accused are placed in detention (custody),
- speak to persons whose detention was ordered by court, without presence of other persons,
- ask the employees of Prison service in the prison to give any necessary explanations, submit files, documents, orders and decisions concerning the imprisonment or detention (custody),
- when supervising the observance of legal regulations during performance of institutional and protective education, propose cancellation of the institutional or imposed protective education to the court or to submit motion for imposing of protective education for children placed in the facility on the basis of ordered institutional education,
- check whether the orders and decision of Prison service in the prison concerning the imprisonment or detention (custody) and procedures of the director of the facility where the institutional or protective education is performed correspond to acts and other legal regulations,
- give orders for acceptance of measures leading to elimination of the situation in contradiction with legal regulations and orders for maintenance of regulations valid for imprisonment or detention (custody),
- order that a child placed in a facility where the specified detention is performed illegally must be released immediately after notification to the bodies of social and legal protection of children,
- order that a person imprisoned illegally or kept in detention (custody) in contradiction to the relevant decisions of a body active in criminal proceedings or without such a decision must be released immediately.

Ad b) From the answer to letter a) it is thus clear that the public prosecutor's office has specific authorisations during the performance of supervision over observance of legal regulations during imprisonment, detention, institutional or protective education. These are means of inspection nature. These means are based solely on law.

Ad c) The public prosecutor's office is obliged to use only means specified by law. No other means specified for it by law can be used. They are banned by article 2 (3) of the Constitution according to which the state power shall serve all citizens and may be applied only in cases, within limits and by methods defined by law. Also in accordance with article 2 (2) of the Charter of fundamental rights and basic freedoms, the state authority may be asserted only in cases and within the bounds provided for by law and only in the manner prescribed by law.

As another authorisation with external results we can also see the authorisation of the Supreme public prosecutor pursuant to Act on the Public prosecutor's office to propose the President of the Supreme Court to suggest the Supreme Court to adopt opinion of the interpretation of law or another legal regulation, if the Supreme public prosecutor obtains facts of disunity in decision of courts in connection with performing competence of the public prosecutor's office.

Non-criminal competence is also determined by Act on private and procedural international law. According to this act, the Supreme public prosecutor comments on the proposal given to the Supreme Court for determination that a legitimate decision of another body in the matters of marriage and paternity determination (establishment or denial) is accepted. In the interest of the society, the Supreme public prosecutor is also entitled to submit a proposal for the statement that it accepts the specified decision.

To clause 7:

Ad a) The European Court for Human Rights dealt with the complaint from the claiming concerning the procedure of the Supreme public prosecutor's office in the matter of investigation of conditions of the legal action of the Supreme public prosecutor concerning paternity denial. No other decision of the European Court for Human Rights concerned non-criminal competence.

In a concrete case heard by the European Court for Human Rights the issue was that Mr P. K. met an unmarried woman who was 7 months pregnant at that moment. When a daughter was later born from this pregnancy, he freely determined his paternity of this child by an approving declaration of parents pursuant to section 52 of Family Code. He did so with full awareness of the fact that he is not the biological father of the child. He did not use the six-month period pursuant to section 61 (1) of Family Code for lodging of own action for paternity denial for this child and the preclusive period expired in vain.

When later his relationship with the child's mother broke up, he turned to the Supreme public prosecutor's office with request for lodging of an action concerning denial of his paternity pursuant to section 62 of Family Code. After investigation, his request was suspended due to absence of the child's interest in disproof of the assumed paternity, as no other man was interested in paternity of the child and denial of his paternity would not ensure connection of the child with its biological father. The child would probably remain fatherless, which would unnecessarily weaken its position, for example as regards maintenance. Due to the same reasons, P.K. later submitted a repeated request to the Supreme public prosecutor's office.

P. K. contested lawfulness of these statements from Supreme public prosecutor's office in the matter of suspension of his requests by means of a constitutional complaint, here he also asked for cancellation of the provisions of section 62 of Act No 94/1963 Coll. Family Code, as amended by later regulations. By its resolution dated April 24, 2006, file ref. No IV.ÚS 158/06, the Constitutional Court rejected his constitutional complaint pursuant to section 43 (1) letter d) of Act on Constitutional Court

with justification that it is not competent for deciding of this matter. Nevertheless, in justification of its decision it stated that Supreme public prosecutor's office explained to the claimant in detail due to which reason it did not consider the particular legal action concerning paternity denial to be in compliance with the child's interests, while it proceeded fully within the limits of its legal competence and it dealt with the objections of the claimant properly.

P.K. then turned with this matter to the European Court for Human Rights with a complaint against the Czech Republic. On January 8, 2007, ECHR, its 5th section, in the senate comprising of 7 judges decided in this matter kept under ref. No 39277/06 about rightfulness (justifiability) of this complaint and here it declared this complaint to be unacceptable and clearly unjustified by majority of its votes.

Here the claimant objected mainly the following:

1) Breach of article 6 (1) of the Convention when his application could not have been heard by the court as the legal order of the Czech Republic entrusts lodging of a motion to the public prosecutor that is a part of the executive power.

ECHR stated to it that in connection with enforcement of right for a fair trial it is necessary to bear in mind that article 6 (1) of Convention can only be applied in the matters (disputes) concerning the rights that are approved in the domestic law and that this provision itself does not provide any material content to these rights determined by the legal order of the parties. The court pointed out that the claimant did not use its denial right within the period determined by law and it stated that the claimant thus required more rights in the particular case than provided by the relevant act. Thus it is clear that the complaint is incompatible "ratione materiae" with Convention provisions.

2) Breach of article 8 in connection with article 13 of Convention

According to ECHR it is not possible to state that refusal of the public prosecutor to commence proceedings concerning paternity denial resulted in the breach of the right of the claimant for respecting of his private life. In this connection the Court reminds the following:

- In cases when the complaint had known since the birth of the child that he is not the biological father it had already inferred that the institute of denial period is justified by concern for ensuring of legal peace of family relations and support for interests of the child (see the case *Rasmussen versus Denmark*). After his period expires, the interest of the child prevails over the interest of the man wishing to deny its paternity. Nothing enables agreement with the argumentation of the claimant according to which it is in interest of the child so that the right to deny paternity is not limited.

According to the opinion of the court, the correct balance between various interests involved was maintained. It is not possible to consider it to be an unjustified fact that after the period determined for the claimant for paternity denial the offices considered the child's interest to be more important. Unlike the situation in the case *Paulík versus Slovakia* (No 10699/05, December 10, 2006), the claimant had known before the child was born that he was not its biological father, nevertheless it accepted the girl with full awareness of the situation. Moreover, it was a very young child depending apart from others also on his maintenance.

Ad b) The Constitutional Court is authorised to perform the subsequent abstract and concrete checks of constitutionality and legality of acts. It is a right of the Constitutional Court to decide about cancellation of acts or their individual provisions if they are in contradiction to the constitutional order and about cancellation of other legal regulations or their individual provisions if they are in contradiction to the constitutional order or law.

The Constitutional Court is also authorised to perform incidental checks of constitutionality, as it decides about constitutional complaints against legitimate decisions and other interventions of public authority bodies in constitutionally guaranteed fundamental rights and freedoms.

As regards competence of the public prosecutor's office, the Constitutional Court also dealt with its procedure during assessment of conditions for lodging of an action concerning paternity denial, when it came to a conclusion that these conditions were not met due to the fact that paternity denial was not in interest of the child. Pursuant to section 62 of Family Code, the interest of the child is a material law prerequisite of the action of the Supreme public prosecutor for paternity denial.

The decision of the Constitutional Court, file ref. No: I. ÚS 430/98, rejected the proposal of the claimant for commencement of the proceedings by means of which the claimant protested against rejection of his proposal for lodging of motion for paternity denial pursuant to section 62 of Family Code (Act No 94/1963 Coll., as amended by later regulations). In the justification of the decision, the Constitutional Court specified that after the investigation had been made it was not found out that lodging of motion for paternity denial would be required by the child's interest, that section 62 of Family Code cannot be interpreted as another common provision on supportive right within the scope of relations stipulated by family law. According to the justifications of the decision of the Constitutional Court, it is an absolutely exceptional authorisation of a state body (Supreme public prosecutor) that can only be applied under strictly defined conditions. In the particular case this condition is interest of the child in change of family relations.

In justification of the above-specified decision, file ref. No: IV. ÚS 158/06, the Constitutional Court also stated that a constitutional complaint can be filed by a natural person or a legal entity if it claims that a legitimate decision in the proceedings a part of which it was, measure or another intervention of a public authority body breached its fundamental right or freedom guaranteed by the constitutional order. During the application of section 62 of Family Code, the Supreme public prosecutor's office does not decide authoritatively about rights and obligations (duties) of the claimant but only about the fact whether he performs his authorisation contained in the quoted provisions of Family Code. Suspending of the proposal for filing of an action concerning paternity denial by the Supreme public prosecutor's office cannot be considered a decision or a measure pursuant to section 72 (1) of Act on Constitutional Court, it is only notification of the claimant concerning the fact how the proposal was dealt with. The Constitutional Court points out that the right to deny paternity belonged to the claimant from law but it was not used by him within the determined period and as a result of this it ceased to exist. The Constitutional Court also specified that like the rejected complaint, also the connected proposal for cancellation of section 62 of Family Code will be rejected, as proceedings concerning proposal for cancellation of a legal regulation pursuant to section 74 of Act on Constitutional Court are accessorial proceedings etc.

The Constitutional Court came to similar conclusions in its other decisions, file ref. No IV. ÚS 339/05 and file ref. No III. ÚS 628/05.

To clause 8: The legislator chose the non-criminal competences of public prosecutor's office with regard to the areas which concern the protection of rights of persons whose rights can be threatened due to their personal or psychic qualities,

where the breach of law can have a wider impact, where economy and mainly the market relations can be disturbed significantly by serious criminal activities. In these areas, which are covered by non-criminal competence, the main criterion for protection of a public interest is protection of fundamental human rights.

From the point of view of the requirement for protection of fundamental human rights, supervision of observance of legal regulations during performance of institutional and protective education and performance of detention or imprisonment sentence is of special importance.

Participation of the public prosecutor's office in the civil proceedings due to protection of human rights is necessary in the matters of social and legal protection of children. This concerns the authorisation of the public prosecutor's office to lodge a motion for imposition of institutional education, imposition of educational measures, suspension, limitation or disqualification of parent responsibility pursuant to Family Code, for imposition of protective education according to act on justice in the matters of the youth and act on performance of institutional education or protective education in school facilities and on preventive educational care in school facilities, for cancellation of the ordered institutional or imposed protective education pursuant to act on performance of institutional education or protective education in school facilities and on preventive educational care in school facilities, for imposition of measures pursuant to act on justice in the matters of the youth. As regards the protection of rights and interests of children as well as stability of its status conditions, legal actions of the Supreme public prosecutor concerning the paternity denial are highly significant. An important anti-corruption tool is the authorisation of the Supreme public prosecutor to lodge administrative actions if a serious public interest is found for it. This competence is also very important for enforcement of legality.

In the area of protection of human rights, entering the civil proceedings which were commenced by the court without a motion or on the basis of a motion of another plaintiff in the matters of imposition of educational measure, order of institutional education, suspension, limitation or disqualification of parent responsibility, capability of legal acts, specification of acceptability of acceptance or keeping in a health care institution or determination whether it is necessary to have consent of child's parents for his/her adoption are also important.

Participation of public prosecutor's office in bankruptcy proceedings and incident disputes on the basis of entering such proceedings corresponds significantly not only to strengthening of legality but also to protection of economy and market relations, also due to the fact that in these proceedings it gains knowledge concerning criminal offences for the purposes of criminal proceedings. Entering of the public prosecutor's office (which is a body active in criminal proceedings at the same time) in the specified proceedings is thus also important due to revealing of criminal activities. The new insolvency act, which will come in force on January 1, 2008, gives a new power to the public prosecutor to lodge motions for commencement of an incident dispute concerning determination of invalidity of a legal act.

By entering the proceedings in the matter of determination of auction validity, the public prosecutor's office fulfils the requirement of the society for protection of rights of persons that can be affected or threatened by illegal activities based on the misuse of the assets acquisition determined by law. At the same time the public prosecutor's office will use any possible knowledge concerning suspected criminal

activities arising from the course of these civil proceedings for the performance of its competence in the criminal area.

By application of legal means in the civil proceedings, the public prosecutor's office contributes to unification of court judicature. It is also enabled due to the above mentioned authorisation of the supreme public prosecutor to submit to the presiding judge of the Supreme Court a request to ask the Supreme Court to adopt a standpoint for interpretation of an act or another legal regulation.